IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1283

METROPOLITAN SEWERAGE COMMISSION
OF THE COUNTY OF MILWAUKEE,
Petitioner,

v.

FATTORE COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

BRADY, TYRRELL, COTTER & CUTLER
Richard W. Cutler
Elwin J. Zarwell
Peter W. Bunde
Ronald L. Wallenfang
735 N. Water Street
Milwaukee, Wisconsin 53202

April 21, 1972

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statute Involved	3
Statement Of The Case	3
Reasons For Denying The Writ	4
A. The Court of Appeals Decision Is Clearly Correct on the Merits	4
B. There is No Conflict Between the Decision Below and the Decisions of the Wisconsin Supreme Court, or of other Circuit Courts	7
1. Wisconsin Supreme Court	7
2. Eighth and Ninth Circuits	9
C. The Petition Presents No Question of Great Importance Requiring Attention By This Court	11
Conclusion	12
Appendix—Relevant Contract Provisions	13

Page

CITATIONS

Cases:

Dahl v. Housing Authority of the City of Madison, 54 Wis. 2d 22, 194 N.W. 2d 618 (1972) 7, 8, 9

Great Lakes Dredge and Dock Co. v. U.S., 90 F. Supp. 963 (Ct. Cl. 1950) 6

Mandel v. U.S., 424 F. 2d 1252 (8th Cir., Docket No. 19,705, 1970) 9, 10

Nelson v. Boos, 7 Wis. 2d 393, 96 N.W. 2d 813 (1959) 5, 7

Ruhlen v. N.Y. Life Ins. Co., 304 U.S. 202 (1938) .. 9

Thomsen-Abbot Construction Co. v. City of Wausau, 9 Wis. 2d 225, 100 N.W. 2d 921 (1960).... 7

U.S. v. Hathaway, 242 F. 2d 897 (9th Cir. 1957).. 9

Miscellaneous:

Annotation, 85 A.L.R. 2d 211 .....6, 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1283

METROPOLITAN SEWERAGE COMMISSION
OF THE COUNTY OF MILWAUKEE,
Petitioner,

v.

FATTORE COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 454 F. 2d 537. The District Court's opinion is reported at 324 F. Supp. 354.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

A. On the Merits

Is respondent sewer construction contractor entitled to an "equitable adjustment" to reflect the added costs of tunneling through subsurface ground conditions mate-

rially differing from the ground conditions represented as "likely to be encountered" by test borings furnished to bidders, where the contract under which the work was done contained a "changed conditions" section providing such equitable adjustment in a component of the contract which pursuant to express contract language, controlled over a component of the contract containing language which stated that the owner-petitioner did not guarantee the borings?

B. On Grounds for Issuance of a Writ of Certiorari

Where a contractor seeks an equitable adjustment to reflect the added cost of tunneling through subsurface ground conditions materially different from those indicated by test borings made by the contracting authority, both under a "changed conditions" section of the contract, and as an independent grounds, on the basis of misrepresentation and breach of warranty, is the Seventh Circuit's decision *denying* recovery for misrepresentation or breach of warranty, but providing recovery under the "changed conditions" clause in conflict with:

1. Decisions of two other circuits that also deny recovery for misrepresentation and breach of warranty; (Neither case in the other circuits involved a "changed conditions" clause.) or

2. A decision of the Wisconsin Supreme Court which sustained a *finding* below that no "conditions materially different from those indicated in the plans and specifications" existed and consequently denied liability under a "changed conditions" clause, when, unlike the case there, in the case at bar the trial court here *found* as a matter of fact that subsurface conditions were "materially different" from those "indicated" in the plans and specifications and the

the court of appeals sustained that finding in allowing recovery under a "changed conditions" clause?

STATUTE INVOLVED

None. The issue is one of contract interpretation.

STATEMENT OF THE CASE

The respondent is a construction contractor and brought this action to recover additional costs incurred in the performance of a sewer construction contract requiring tunneling more than 100 feet below the surface, where the ground conditions encountered in tunneling materially differed from conditions shown by test borings furnished to bidders by the contracting authority. The action was based on a "changed conditions" clause in the contract, and also on common law misrepresentation and breach of warranty.

Petitioner made no argument that the conditions did not in fact materially differ from those indicated by the borings, and both the trial court and court of appeals found that the actual conditions did materially differ from those indicated by the borings. 324 F. Supp. 358, 454 F. 2d 539-540.

The "changed conditions" clause was part of the General Conditions, Section I of the contract, which by contract stipulation was the highest priority component of the contract. (See pp. 14-15, infra.) The Instructions to Bidders, a lower priority component of the contract, contained exculpatory language stating that the Sewerage Commission did not guarantee the accuracy of the borings, and requiring contractors to make an independent determination of soil conditions.

The trial court held that the changed conditions clause did not provide for additional compensation in this case, because of the exculpatory language, and because no changes had been made by the Commission's engineer.

The Court of Appeals reversed, holding that the Sewerage Commission had a mandatory duty to change the drawings to show the conditions actually encountered. [The clause states that if the Commission's Engineer finds that actual conditions "materially differ from those shown in the drawings or indicated in the specifications, he *shall* at once make such changes . . ."] The Court of Appeals also held that the exculpatory language in the Instructions to Bidders could not defeat the specific language of the changed conditions clause.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Decision Is Clearly Correct on the Merits.

There was never any question that Respondent did encounter, in the words of the changed conditions clause, "subsurface and/or latent conditions materially different from those shown on the drawings or *indicated* in the specifications . . . ," or that "the attention of the Engineer [was] . . . call[ed] immediately to such conditions before they [were] disturbed."

Petitioner's argument is based on the phrase "he [the Commission engineer] shall at once make such changes in the drawings and (or) specifications as he may find necessary," [and the cost resulting from such changes shall be equitably adjusted.]

The defendant would read into this sentence a requirement that there be *design* changes. Such require-

ment just is not there, and cannot be read in by implication without depriving the "Changed Conditions" clause of any meaning independent of the "Changes" clause. It is the *indications* in the contract that must be changed; i.e., if subsurface conditions materially differ from those *indicated* in the contract, the Engineer *shall* change the drawings or specifications so that the *indications* conform to the conditions actually encountered. The Seventh Circuit properly refused to interpret the clause in a manner that would render meaningless a portion of the highest priority component of the contract.

As the Court of Appeals stated, the interpretation of the "Changed Conditions" clause (paragraph 20) urged by Petitioner

> "is to the effect that it conditionally authorizes the Engineer to make changes he has the unconditional authority to make under Paragraph 19. To so read Paragraph 20 would be contrary to the fundamental doctrine of construction recognized in *Nelson v. Boos,* 7 Wis. 2d 393, 399, 96 N.W. 2d 813, 817, where it is stated:
>
> 'A construction which renders meaningless a provision expressed in the contract or which results in surplusage should be avoided if possible.' 454 F. 2d at 543.

Petitioner is critical of the Seventh Circuit's reliance on Court of Claims decisions interpreting Article 4 of the U.S. Government Standard Construction Contract. According to Petitioner, Article 4 reflects a federal procurement policy which has no application here, and, while there is "some similarity in language" between Article 4 and Paragraph 20, "[t]here was . . . absolutely no evidence" that the Sewerage Commission's policy was the same as federal procurement policy. Petition, pp. 11, 15.

Petitioner overlooks the fact that the very line of cases it seeks to distinguish as due to "federal procurement policy" arose because the federal government, like the Sewerage Commission here, sought to invoke the exculpatory language to avoid making equitable adjustments for changed conditions.

"Article 4" has been used in federal contracts for more than thirty years. During this time, a number of formal changes have been made; however, there have been no changes in substance that would affect the facts of this case. *See* 85 A.L.R. 2d 213, Note 4. For comparison purposes, one of the early forms of Article 4 is set out herein, with the portions identical to the clause at bar italicized:

> *"Art. 4. Changed Conditions.—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the* contracting officer *shall be called immediately to such conditions before they are disturbed. The* contracting officer *shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once,* with the written approval of the head of the department or his representative, *make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in* article 3 *of this contract."*
>
> Quoted from *Great Lakes Dredge and Dock Co. v. U.S.*, 90 F. Supp. 963, 964 (Ct. Cl. 1950)

We question whether even a David Hume could doubt that there is more than "some similarity in language" between the clauses, and fail to look to cases interpreting Article 4 as possible authorities for interpreting the clause at bar.

B. There is No Conflict Between the Decision Below and the Decisions of the Wisconsin Supreme Court, or of other Circuit Courts.

1. Wisconsin Supreme Court

Petitioner's principal brief asserts a conflict with Wisconsin law, but does not relate the asserted conflict to any particular decision of the Wisconsin Supreme Court. The most pertinent Wisconsin decision it cites, *Nelson v. Boos, supra,* p. 5, is precisely the authority on which the Court below relied in reaching its result. *Thomsen-Abbot Construction Co. v. City of Wausau,* 9 Wis. 2d 225, 100 N.W. 2d 921 (1960), also cited by Petitioner, did not involve a changed conditions clause, but it did state that exculpatory language will not always be given its full literal reach, to wit:

> "... a contractor bidding on a public-work project has the right to rely on the express representation contained in the plans even in the presence of a contract clause similar to the one in the instant contract, which places a duty of investigation upon the contractor." 9 Wis. 2d at 233, 100 N.W. 2d at 926.

Thus the *Thomsen-Abbot* case supports the decision of the Court below.

In its Supplemental Memorandum, Petitioner discusses *Dahl v. Housing Authority of the City of Madison,* 54 Wis. 2d 22, 194 N.W. 2d 618 (1972), which did involve a changed conditions clause. The *Dahl* contract

was for construction of a 160 unit housing project at four different sites. The specifications stated:

> ". . . On Site C, soil investigation indicates a layer of peat. Where footings and foundations occur in this material or immediately above, remove the peat to its full depth and . . ." 54 Wis. 2d at 25; 194 N.W. 2d at 620.

The contractor did encounter the indicated layer of peat at Site "C", approximately two feet below the footings. Asserting that the footings were not "in this material or immediately above", the contractor claimed he had encountered a "changed condition". Not surprisingly, the Court found, as a matter of fact, that the contractor had not encountered conditions "differing materially from those indicated in the contract".

In our case, there never was any question that conditions did materially differ.

> "The defendant's test borings disclosed clay, coarse sand and gravel to be the character of the soil down to the 100 foot underground level — the floor of the proposed sewer tunnel. . . . However, the actual underground conditions encountered in the performance of the work differed materially from those indicated by the defendant's test borings. Solid rock and mixed face were encountered at the sewer grade throughout the first 496 feet of the tunnel. . . . as a result the tunneling costs were substantially increased. In addition, the presence of silt and fine sand, as well as bedrock at or immediately below the sewer grade, frustrated the use of deep wells and dewatering costs increased." 454 F. 2d 539-540.

Contrary to Petitioner's assertions, the Wisconsin Supreme Court did not reject the Court of Claims decisions. Rather, the context is clear that recovery would have followed had the existence of changed conditions been

established, even though no design changes were made. It follows that, as a matter of contract interpretation, *Dahl* supports the position of Respondent, and not that of Petitioner.

The Court in *Dahl* upheld a finding of fact:

> "The trial court's holding that '. . . the plaintiff was required to remove the fill dirt in question in accordance with the terms of the contract' is not to be reversed unless it is contrary to the great weight and preponderance of the evidence. Given the nature of this construction project, the type of buildings involved and the terms of the contract and specifications, we cannot and do not find the trial court finding and conclusion contrary to the great weight of the evidence." 54 Wis. 2d at 28, 194 N.W. 2d at 621.

In our case, the undisputed fact is that changed conditions were encountered. The conflict of law asserted by Petitioner does not exist.

2. Eighth and Ninth Circuits

Petitioner asserts a conflict between the case at bar and *Mandel v. U.S.*, 424 F. 2d 1252 (8th Cir. 1970) and *U.S. v. Hathaway*, 242 F. 2d 897 (9th Cir. 1957). Inasmuch as our case, as Petitioner asserts, is governed by Wisconsin law, even the existence of a conflict with decisions interpreting the law of other jurisdictions would not justify granting a writ of certiorari. *Ruhlen v. N.Y. Life Ins. Co.*, 304 U.S. 202, 206 (1938).

In any event, there is no conflict. Neither *Mandel* nor *Hathaway* involved a changed conditions clause. They were cases in which the contractor sought relief on the basis of misrepresentation and breach of warranty, rather than under a changed conditions clause.

In our case, the Court below *supported* Petitioner and denied relief on the misrepresentation and breach of warranty issues. 454 F. 2d 539.

Inasmuch as neither *Mandel* nor *Hathaway* involved a changed conditions clause, it is difficult to see how the interpretation of that clause in the case at bar could conflict with those cases.

In fact, the Government's brief in *Mandel* carefully distinguished that case from cases involving a "changed conditions" clause:

> "It is significant, . . . that the contract between these parties contains no "changed conditions" clause. Such a clause typically provides that if the contractor encounters conditions different from those indicated in the drawings, it will be reimbursed for expenses occasioned by the change. *See, e.g., United States v. Rice*, 317 U.S. 61 (1942); *Ragonese v. United States*, 120 F. Supp. 768 (Ct. Cl., 1954) The primary purpose of including changed conditions clauses is to encourage lower bids. *James Julian, Inc. v. President and Com'rs. of Town of Elkton*, 341 F. 2d 205, 209 (C.A. 4, 1965). Conversely, the absence of a changed conditions clause can be expected to cause bidders to increase their prices to cover possible misfortunes. See *Schutt Constr. Co. v. United States*, 353 F. 2d 1018, 1021 (Ct. Cl., 1965). (Similarly, Mandel's assumption of the risk that the government's air cooling load estimate was erroneous presumably resulted in a higher bid price.) In light of this, the government is entitled to receive something in return for the presumably higher price occasioned by the absence of a changed conditions clause. It simply is unfair for the contractor to receive both the higher contract price and recovery for the expense occasioned by the risk he has assumed."

Maurice Mandel, Inc. v. U. S., 8th Cir. Docket No. 19,705, "Supplemental Memorandum for the United States," pp. 10, 11.

C. The Petition Presents No Question of Great Importance Requiring Attention By This Court.

It cannot be denied that the general field of public work contracts is a large and important area of law. It does not follow that every question of contract interpretation in this area merits review by the U. S. Supreme Court. In particular, no review is necessary to interpret changed conditions clauses, which have a well settled and uniform interpretation, both in federal court of claims cases, and in cases arising in other jurisdictions. *See Annotation*, 85 A.L.R. 2d 211.

Petitioner asserts that:

> "There is no reason why a contracting unit faced with a large project and little information should not be able to allocate the risk of adverse conditions to the contractor and rely on competition among bidders to control costs. The Seventh Circuit Court of Appeals has precluded this approach." *Petition*, p. 23.

On the contrary, Petitioner need only omit the changed conditions clause from its contracts to avoid paying for extra costs arising out of changed conditions. The Court below in this very case denied Respondent's claims based on misrepresentation and breach of warranty, as independent causes of action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

Richard W. Cutler
Elwin J. Zarwell
Peter W. Bunde
Ronald L. Wallenfang
Counsel for Respondent

Of Counsel:
BRADY, TYRRELL, COTTER & CUTLER
735 North Water Street
Milwaukee, Wisconsin 53202

APPENDIX

RELEVANT CONTRACT PROVISIONS

Instructions to Bidders

"The Sewerage Commission has, so far as has been possible, located the underground and surface structures which may be encountered in constructing the work embraced in this proposal and has made test borings to determine the character of the ground likely to be encountered. Being public information, any bidder may have access to it, but the Sewerage Commission does not guarantee the correctness or accuracy of such information and does not guarantee that all the underground structures likely to be encountered are shown upon the plans, that the location of those shown is accurate, nor that the character of the ground is uniform between borings, in fact, the Engineers anticipate that, during the work, underground structures of which the Sewerage Commission has no record or information will be encountered, and that there will be variations in the character of the ground between the test borings.

* * *

"It is expected that each bidder will, prior to submitting his bid, ascertain the character of the soil through which the work is to be done, and obtain such other information as will assist him to make an intelligent bid."

* * *

General Conditions, Section I

* * *

"19. *Changes.* The Engineer may at any time, by a written order and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the

contract shall be modified in writing accordingly. No changes shall be made without first obtaining the approval in writing of the Engineer or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten (10) days from the date the change is ordered, unless the Engineer shall for proper cause extend such time. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

"20 *Changed Conditions.* Should the Contractor encounter, or the Sewerage Commission discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the Engineer shall be called immediately to such conditions before they are disturbed. The Engineer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings, or indicated in the specifications, he shall at once make such changes in the drawings and (or) specifications as he may find necessary and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Paragraph 19 of this contract."

* * *

"Any provision in any of the contract documents which may be in conflict or inconsistent with any of the foregoing paragraphs in the General Conditions, Section I, shall be void to the extent of such conflict or inconsistency."

* * *

Contract

"ARTICLE 4. COMPONENT PARTS OF THIS CONTRACT — This contract consists of the following component parts, all of which are as fully a part of this contract as if herein set out verbatim or, if not attached, as if hereto attached:

1. General Conditions, Section I

2. General Conditions, Section II
3. Advertisement for Bids
4. Instructions to Bidders
5. Specifications, including addenda Numbers ——
6. Plans
7. Contractor's Proposal
8. This instrument

"In the event that any provision in any of the component parts of this contract conflicts with any provision in any other of the component parts, the provision in the component part first enumerated above shall govern over any other component part which follows it numerically, except as may be otherwise specifically stated."

* * *

Specifications

* * *

"4. Borings. The Metropolitan Sewerage Commission of the County of Milwaukee has made seven test borings along the route of that portion of the sewer in this contract. The logs and locations of these borings are shown on the drawings." * * * (From Appendix to 7th Circuit Briefs, pp. 411-423)